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Malpractice vs. 'Malresult'

A new form of insurance for an eternal problem

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Doctors and patients both take risks when they do business together. The physician (for the most part), only puts his wealth at risk: He protects himself by means of malpractice insurance. But for the patient, both wealth and physical health are at risk. At present, the patient can protect himself only against the risk of incurring a ruinous financial cost for the diagnosis and treatment of his illness: He protects himself by means of health insurance. How do we create an insurance regime that provides a form of protection neither of these policies can provide?

I propose a new form of medical insurance for the patient: protection against the risks of diagnostic and therapeutic procedures that may or may not be due to bona fide medical negligence—that is, "malresult insurance."

When a patient suffers an undesirable outcome as a result of medical care, the harm may or may not be the physician's fault. More often than not, the "malresult" is an "act of God." Nevertheless, malresults are now often attributed to and treated as cases of medical malpractice (negligence). Making medical malresult insurance available and expecting patients to use it would be a step toward more fully recognizing the commercial aspects and risks of the medical situation.

People who choose to buy a house purchase home owner's insurance. People who choose to drive purchase (are compelled by law to purchase) automobile insurance. Similarly, people who choose to undergo diagnostic and therapeutic procedures ought to be able, and be expected, to purchase medical malresult insurance.

In ordinary commercial relations, premiums for insurance depend on the demonstrated behavior of the insured. Drivers with a good record pay a lower premium than drivers with a record of traffic violations. In medical malpractice insurance, this fundamental principle is largely inoperative.

Obstetricians and neurosurgeons pay a much higher premium for malpractice insurance than do ophthalmologists and pediatricians. Why? Not because they are more prone to practicing medicine negligently than physicians in other specialties, but because the procedures they perform are more hazardous than those performed by ophthalmologists and pediatricians. Accordingly, patients who submit to high-risk procedures especially need insurance to protect themselves from malresult, just as physicians who perform such procedures especially need insurance to protect themselves from malpractice.

Virtually all medical encounters are risky. The chance of dying during or after general anesthesia is one in 10,000. The risk of perforation of the colon during diagnostic colonoscopy is 0.2 to 0.4 percent; it increases to between 0.3 and 1.0 percent if it is combined with polypectomy; the overall death rate from the procedure is about one in 12,500. The chance of a pregnant woman dying as a result of her pregnancy is approximately 1 in 12,000 (in the U.S.).

The woman who chooses to become pregnant incurs risks similar, in principle, to the risks an entrepreneur incurs who chooses to engage in an activity that may be dangerous to others or himself, say, transporting gasoline. The pregnant woman exposes herself to the risk of having an abnormal baby or becoming the victim of a medical complication (for example, a stroke). It is reasonable that she bear the cost of insuring herself against these contingencies.

If an obstetrician delivers an abnormal infant, regardless of whether he is innocent or guilty of malpractice, juries are likely to find him liable for large damages. If the expectation for the purchase of insurance for malresult were as firmly established as is the expectation for the purchase of insurance for malpractice, pregnant women would be expected to protect themselves by purchasing such insurance. Obstetricians could then restrict their practices to women who have such insurance (the cost of which would be negligible compared with the cost of raising a child). As a consequence, their exposure to malpractice litigation would shrink to a fraction of its present size.

The diagnosis and treatment of disease is dangerous for the patient economically as well as medically. At present, the patient protects himself from the economic harm of the medical situation by health insurance, and expects to be protected from the medical harm by the physician's malpractice insurance. This arrangement fails to distinguish between injury the patient suffers as a result of the nature of his illness and treatment, and injury the physician inflicts on him as a result of improper care.

To the victim of a medical catastrophe, it makes little difference why such a calamity befalls her or him. Delivering an infant with spina bifida or becoming quadriplegic as a result of a hazardous spinal cord operation irrevocably changes the life of the mother and neurosurgical patient. Perhaps largely for that reason, tort law does not adequately recognize the difference between medical "malresult" that happens through no fault of anyone, and medical malpractice, that is, bona fide medical negligence. The result is that, in a suit for malpractice brought by a poor, disabled patient against a rich insurance company (and healthy physician), the jury is more likely to base its judgment on compassion for the sufferer than on the merits of the case (that is, on the question of the physician's culpability or lack of it for the patient's injury). Awarding a large sum to the plaintiff-victim "feels" like the "right thing to do" and makes members of the jury feel better.

Tort litigation cannot restore health irrevocably lost, much less bring back the dead. All it can do is take money from the insurance company (and/or the physician) and give it to the victim or his family (and his lawyers). Adding a market in patient insurance for malresult to the market in physician insurance for malpractice would accomplish two important goals. It would guarantee compensation for the injured patient, more expeditiously and securely than malpractice insurance does, and it would protect the physician innocent of malpractice from having to settle claims against him. (Insurance companies could establish a schedule of specified diagnostic and therapeutic malresults similar to the schedule of bodily injuries specified in policies for accidental bodily injury and death.)

According to the American Medical Association, 20 states now face a full-blown medical liability crisis. Data from the National Association of Insurance Commissioners shows a 750 percent increase nationally in malpractice insurance premiums since 1975. For some specialists, such as obstetricians, the annual insurance premium exceeds $200,000.

High malpractice premiums cause physicians to restrict their practices or retire early, and lead medical students to avoid going into lawsuit-magnet specialties like obstetrics and neurosurgery. While the risk of malpractice litigation affects all physicians, those most affected are specialists whose patients are most likely to suffer devastating injuries. Similarly, while all patients need malresult insurance, those who need it most are obstetrical and neurosurgical patients.

People do not go skiing to break a leg. If they do so, they are, as a rule, responsible for paying the cost of their treatment or for having insurance to pay it. People do not consult physicians to become disabled or die. If they do, they ought to be responsible for the financial consequences or have insurance to compensate them for their loss, unless the physician commits demonstrable malpractice.

Sooner or later, we shall have to confront our inconsistent expectations from modern medical technology. We demand, as a "right," the accurate diagnosis and effective treatment of disease; but when, in the process, we suffer, we feel medically and legally wronged and take to the courts. Rights and responsibilities cannot be disjoined forever. It is a delusion to believe that we can continue to assume medical risks without assuming responsibility for the harms we suffer as a consequence. The availability of insurance for malresult would radically change the medical tort litigation scene: it would place some of the responsibility for risks inherent in medical diagnoses and treatments on patients, where it rightfully belongs

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